BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2018-319-E

IN RE:	Application of Duke Energy Carolinas, LLC for Adjustments in Electric Rate Schedules and Tariffs and Request for an Accounting Order	**RESPONSE TO PETITION OF DUKE ENERGY CAROLINAS, LLC FOR REHEARING OR RECONSIDERATION OF ORDER NO. 2019-323**

The South Carolina Office of Regulatory Staff ("ORS") respectfully submits this Answer pursuant to S.C. Code Ann. Regs. 103-826 (2012) to the Duke Energy Carolinas, LLC ("DEC" or the "Company") Petition for Rehearing or Reconsideration ("Petition") of Public Service Commission of South Carolina ("Commission" or "PSC") Order No. 2019-323 issued on May 21, 2019. ORS asserts that the Commission's Order is just, fair, and supported by substantial evidence on the whole record with the exceptions as raised by ORS in its Petition for Clarification and Reconsideration filed with this Commission on May 31, 2019.

A. Coal Ash Remediation and Disposal Costs

The Commission's decision to disallow recovery of $469,894,472 in coal ash remediation and disposal costs ("Coal Ash Costs") is supported by the substantial evidence on the whole record and appropriate. The unpermitted discharge by Duke Energy of approximately 27 million gallons of coal ash wastewater and an estimated 39,000 tons of coal ash into the Dan River played a deciding role in the development of North Carolina's Coal Ash Management Act ("CAMA") in its present form, not only accelerating the timing of action required, but also limiting the options to remediate and close coal combustion residuals impoundments more than would eventually occur under the Federal Coal Combustion Residuals ("CCR") Rule. (Tr. p. 1340-15, ll. 7-17). Information exposed in the Duke Energy federal plea deal revealed that on two separate occasions, Duke Energy engineers at the Dan River plant requested an immaterial amount of budget funding

to pay for video equipment to scope the pipe that later failed. (Tr. p. 1459-35, ll. 7-10). Duke Energy engineers were denied their request. (Tr. p. 1459-35, ll. 10-11). In response to the Dan River spill, the North Carolina Legislature passed CAMA that required the closure of existing coal ash ponds as well as conversion from wet ash to dry ash handling. (Tr. p. 1459-35, ll. 13-16). DEC and Duke Energy Progress, LLC ("DEP") were criminally and civilly negligent in their operations and maintenance of the impoundments for years prior to the enactment of CAMA, confirming that DEC and DEP failed to responsibly address and correct these issues adequately – and consequently in a much less costly – manner than it is currently being required to do. (R. p. 1340-16, ll. 2-8). Duke Energy management made specific decisions that resulted in the coal ash spill in North Carolina, that in turn, led to the creation of CAMA. (Tr. p. 1459-39, ll. 29-31).

North Carolina's CAMA is significantly more restrictive and stringent than the federal CCR Rule (R. p. 1340-21, ll. 3-4). According to Duke Energy's director of environmental policy, Mark McEntire, "'[t]he NC law came before the CCR [rule]," he said. "We find that NC CAMA that is specific to NC is generally driving decision making on a management perspective on coal ash...From a comparison perspective the CAMA is generally a good bit more stringent."' (Tr. p. 1461-4, ll. 13-17). Additionally, witness Wittliff testified that North Carolina's CAMA rules resulted in additional expenses being incurred at several of DEC's facilities due to accelerated closure schedules that the federal CCR rule did not require or closure requirements that the federal CCR rule did not require. (Tr. p. 1340-32, Table 5.2).

DEC directly assigns certain costs to its North Carolina and South Carolina jurisdictions and often these costs are derived from laws and regulations specific to that jurisdiction. (Tr. p. 2028-5, l. 20 – p. 2028-6, l. 4). Additionally, the Company has already excluded certain costs from this proceeding that were incurred due to North Carolina law including: recovery of certain costs that are associated with the provision of drinking water to North Carolina residents, the costs to comply with the North Carolina Clean Smokestacks Act, North Carolina Renewable Portfolio Standards, and the North Carolina Competitive Energy Solutions for NC (HB.589) laws. (Tr. p. 2032-6, ll. 17-21). Finally, the South Carolina General Assembly has not passed legislation that is similar to North Carolina's CAMA. (Tr. p. 1340-20, ll. 21-22).

1. <u>The Commission's Decision is Supported by South Carolina and Federal Law</u>

"The party challenging a PSC order must establish that (1) the PSC decision is not supported by substantial evidence and (2) the decision is clearly erroneous in light of the

substantial evidence in the record." *Kiawah Property Owners Group v. Public Service Comm'n of S.C.*, 359 S.C. 105, 109, 597 S.E.2d 105, 109 (2004). "Because the Commission's findings are presumptively correct, the party challenging the Commission's order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole." *South Carolina Energy Users Committee v. Public Service Comm'n of S.C.*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010). Although the burden of proof in showing the reasonableness of a utility's costs that underlie its request to adjust rates ultimately rests with the utility, the South Carolina Supreme Court has concluded that the utility is entitled to a presumption that its expenses are reasonable and were incurred in good faith. *Hamm v. Public Service Comm'n of S.C.*, 422 S.E.2d 110, 309 S.C. 282 (1992) (internal citations omitted). However, that presumption is not dispositive, the burden remains on the utility to demonstrate the reasonableness of its costs, and the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge. *Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff* 392 S.C. 96, 109, 708 S.E.2d 755, 762 (2011). "The ultimate burden of showing every reasonable effort to minimize fuel costs remains on the utility." *Hamm v. Public Service Comm'n of S.C.*, 309 S.C. 282 286, 422 S.E.2d 110 112,113 (1992). Additionally, "[i]n rate cases, [the] Public Service Commission is recognized as the 'expert' designated by the legislature to make policy determinations regarding utility rates." *Hamm v. Public Service Comm'n of S.C.*, 294 S.C. 320, 322, 364 S.E.2d 455, 456 (1988) citing *Patton v. Public Service Comm'n of S.C.*, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984).

In this instance it's clear that other parties presented evidence that overcame the presumption of reasonableness to which the Company was entitled. Multiple witnesses testified that Duke Energy's actions led to the release of coal ash into the Dan River and the enactment of CAMA. Parties presented evidence that CAMA was enacted as a direct result of the Company's action and that costs increased as a result of CAMA. Additionally, evidence was presented to the Commission that it would be unreasonable for South Carolina customers to bear these increased costs, which result from a North Carolina law and Duke Energy's discharge of approximately 27 million gallons of coal ash wastewater and an estimated 39,000 tons of coal ash into the Dan River. According to witness Wittliff, ORS has taken the position that North Carolina laws, over which DEC's South Carolina customers have no meaningful input, should not place an additional burden on the ratepayers of South Carolina. (Tr. p. 1340-29, ll. 19-22).

Any presumption to which the Company was entitled is not dispositive. The Company's assertion that the Commission lacked a legal basis for denying its recovery of the Coal Ash Disposal costs is incorrect. The record is replete with evidence which supports the Commission's decision that recovery of the Coal Ash Disposal costs from South Carolina ratepayers would be unreasonable. The Commission properly relied upon substantial evidence on the whole record, which overcame the presumption of reasonableness, in determining it would be unreasonable for South Carolina customers to bear these Coal Ash Disposal costs.

The Company alleges that the Commission's Order results in an unconstitutional taking; however, no unconstitutional taking occurred because no property right existed in the first place. The Company's filing presumes that the Company had the *right* to recover its sought Coal Ash Disposal costs, which of course, as evidenced by the Company's application in which it sought recovery, it did not. The Fifth Amendment to the United States Constitution provides that "private property shall not be taken for public use, without just compensation." U.S. Const. amend. V.[1] However these protections only arise where a property right exists. Because the Company had no right to recovery of its Coal Ash Disposal costs, no unconstitutional taking occurred.

The Company has also asserted that the Commission's Order violates the Commerce Clause of the United States Constitution. ORS objects to this argument being just now put before the Commission. The Company had the opportunity to raise this issue during the hearing, in its Proposed Order and in its Brief but failed to do so. In discussing Petitions for reconsideration or Rehearing filed before it, the South Carolina Supreme Court stated, "[t]he purpose of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this court a second time." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933).

However, notwithstanding and while preserving the above objection, the Commission's Order does not engage in economic discrimination or burden the flow of interstate commerce. South Carolina's Commission does not dictate actions of the Company, the North Carolina

[1] The Fifth Amendment is implicit in the due process clause of the Fourteenth Amendment to the United States Constitution and applicable to the states. *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

Legislature, or other Commissions and has not engaged in economic discrimination or burdened the flow of interstate commerce.

The Company has also asserted that the Commission's Order violates the doctrine of equitable estoppel. ORS objects to this argument being just now put before the Commission. The Company had the opportunity to raise this issue during the hearing, in its Proposed Order and in its Brief but failed to do so. "The purpose of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this court a second time." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933).

However, notwithstanding and while preserving the above objection, there is ample evidence in the record that the Coal Ash Costs at issue were unreasonable and should not be forced upon the Company's South Carolina ratepayers and the Commission did not violate the doctrine of equitable estoppel. Generally, "'estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy.'" *Quail Hill, LLC v. County of Richland,* 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (quoting *Greenville County v. Kenwood Enters., Inc.,* 353 S.C. 157, 171, 577 S.E.2d 428, 435 (2003)). Estoppel runs against the government only in certain limited situations. In these situations, the party claiming estoppel against the government "must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." *Id.* at 236-37, 692 S.E.2d at 506. "In its broadest sense, equitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." 28 Am. Jur. 2d Estoppel and Waiver § 27 (2011). "The essence of equitable estoppel is that the party entitled to invoke the principle was misled to his injury." *S.C. Pub. Serv. Auth. v. Ocean Forest, Inc.*, 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). "The party asserting estoppel bears the burden of establishing all its elements." *Morgan v. S.C. Budget & Control Bd.,* 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (quoting *Estes v. Roper Temp. Servs.,* 304 S.C. 120, 122,403 S.E.2d 157, 158 (Ct. App. 1991)). "Absent even one element, estoppel will not lie against a government entity." *Id.* at 320, 659 S.E.2d at 267.

In this instance, the Company has failed to meet its burden of establishing all elements of its equitable estoppel claim and as a result, the claim fails. However, assuming *arguendo* that the Company had attempted to establish all elements it nonetheless would have failed. The Company itself removed certain costs related to Coal Ash Disposal costs, as well as costs incurred due to other North Carolina laws. (*See* Tr. p. 2032-6, ll. 17-21). Therefore, it's clear that the Company had no justifiable reliance that this Commission would allow recovery of these Coal Ash Disposal Costs. Additionally, the Commission has consistently removed from recovery costs incurred due to other states' laws that are over and above what South Carolina law requires.[2] As a result, there has been no prejudicial change in position. For the foregoing reasons, it is clear the Company's claim that the Commission's Order violates equitable estoppel fails.

The Company also incorrectly claims that the Commission made factual errors. According to the South Carolina Supreme Court, "[t]he Commission sits as the trier of facts, akin to a jury of experts." *Hamm v. Public Service Comm'n of S.C.*, 309 S.C. 282, 287, 422 S.E.2d 110, 113 (1992). While parties may present varying viewpoints, it is the Commission that tries the facts and bases its conclusion thereon. The Company lists errors that it alleges were made by ORS witness Wittliff; however, it fails to connect many of these errors to the record or the Commission's analysis contained in the Order. In fact, many of the allegations cannot be substantiated by the record and are being raised for the first time in the Company's Petition for Reconsideration, and as a result, ORS objects to their consideration. However, notwithstanding and while preserving the above objection, the Commission is the trier of fact, and it properly weighed all evidence put before it by the parties and made a well-reasoned conclusion.[3]

Finally, the Company alleges that the Commission's Order fails to make findings of fact or conclusions of law. This claim is without merit, as evidenced by the findings of fact and conclusions of law on pages 104-105 of the Order, which are supported by the facts and analysis presented on pages 39-52 of the Order. When making specific, express findings of fact, no

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[2] *See* Commission Order No. 2016-871, in which, without objection by the Company, costs were excluded from recovery because South Carolina does not allow purchase acquisition adjustments, which were granted by the North Carolina Public Utilities Commission pursuant to North Carolina Senate Bill 305, S.L. 2015-3, § 1, eff. April 2, 2015.

[3] Assuming the Company had previously raised these allegations, raising them here serves as nothing more than a recitation of evidence that conflicts with evidence presented by ORS witness Wittliff.

particular format is required. *Id.* citing *Airco, Inc. v. Hollington*, 269 S.C. 152, 236 S.E.2d 804 (1977). While it is true, "a recital of a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues," that is not what the Commission has done here. *Able Communications, Inc. v. Public Service Comm'n of S.C.*, 290 S.C. at 411, 351 S.E.2d at 152.

The Commission clearly laid out and considered the evidence presented by the parties and, beginning on page 48 of its Order, detailed its well-reasoned analysis in reaching the conclusion that it would be unreasonable for the Company's South Carolina customers to bear the burden of these Coal Ash Expenses. These costs stem from Duke's negligence, would impose great costs upon South Carolina customers as a result of a law they had no voice in, and allowing one jurisdiction's laws to impose these costs on another's ratepayers would be departure from past practice. As a result, the Commission's Order is not arbitrary or capricious, contains all required analysis and rests upon the substantial evidence in the whole record.

B. <u>Treatment of Deferrals</u>

The Commission's decision results in just and reasonable rates for both DEC and its South Carolina customers and does not violate the rights of the Company. South Carolina Code Ann. § 58-27-810 provides, "[e]very rate demanded or received by any electrical utility . . . shall be just and reasonable." Furthermore, "the fixing of 'just and reasonable' rates involves the balancing of the investor and the consumer interests...." *Southern Bell Tel. & Tel. Co. v. Public Service Comm'n of S.C.*, 270 S.C. 590, 596-97 (1978) (quoting *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602-03 (1944). The Supreme Court has held, that (1) a regulated public utility is entitled to rates that allow it the opportunity to earn a return on its invested capital that is equal to that being made at the same time and in the same general part of the country of other investments in business undertakings with similar risks and uncertainties, (2) the return should be such as to assure confidence in the financial soundness of the utility and adequate, under efficient and economic management, to maintain and support its credit and enable it to raise money necessary for proper discharge of its duties, (3) the utility has no right to the kinds of profits that may be realized in highly profitable enterprises. *Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 692-93 (1923); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602-03 (1944).

The Commission has the duty to determine the most equitable treatment of the Company's requested deferrals by balancing what is best for both the customers and the Company, no statutes or regulatory standards govern recovery of a cost of capital return on a deferral balance. (Tr. p. 1617-3, l. 13 – p. 1617-4, l. 2). The Commission here, based on evidence in the record, reasonably concluded that DEC should not earn returns on portions of its deferrals for the Carolina West Control Center ("CWCC"), W.S. Lee Combined Cycle Facility ("Lee CC"), Environmental Costs, Advanced Metering Infrastructure ("AMI"), Customer Connect, and Grid Improvement Costs ("GIC") (collectively referred to as "the Deferrals"). DEC argues the rulings on the Deferrals violate DEC's constitutional right to recover the prudently incurred costs of providing service. DEC also argues the rulings on the Deferrals are arbitrary and capricious as they are inconsistent with prior rulings which allowed DEC to establish the deferral accounts.

In its Petition, DEC merely states that it was undisputed that the deferred costs were prudently incurred and used and useful, but DEC failed to provide any testimony to show the Company is entitled to earn a return on these costs. While the Commission previously approved the Company's requests for accounting orders to defer the expenses detailed in the Application, the Commission orders provide no guarantee to the Company for cost recovery including a return on those expenses. ORS witness Payne testified per the National Association of Regulatory Utility Commissioners ("NARUC") Rate Case and Audit Manual, a company may recover prudently incurred operating expenses, without a weighted average cost of capital ("WACC") or rate base treatment. (Tr. p. 1613-4, ll. 18 – 22). Witness Payne further testified per the NARUC Rate Case and Audit Manual that a company may recover prudently incurred capital costs through depreciation expense over the life of the asset, while earning a WACC return on the undepreciated balance. (Tr. p. 1613-5, ll. 1 – 3). It is the Commission's duty to examine each deferral and determine whether a return and rate-base treatment are appropriate. With the exception of the deferred Environmental Costs, the Order authorizes DEC to fully recover its deferred expenses.

DEC argues the rulings on the Deferrals are arbitrary and capricious as they are inconsistent with prior rulings which allowed DEC to establish the deferral accounts; however these orders simply established the regulatory deferral accounts and did not authorize any prescription or guarantee to what the Company ultimately recovers. Additionally, the Commission has the authority to change previously accepted methodologies if the evidence supports such a change. *See* Docket 2001-209-C, Order No. 2004-257. The Commission is not acting arbitrarily by not

following precedent, so long as the Commission bases its findings on evidence in the record. *Id.* The Commission's decisions are presumptively correct; therefore, the burden of proof is on the party challenging the decision. *Patton v. Public Service Comm'n,* 280, S.C. 288, 290, 312 S.E.2d 257, 259 (1984). DEC does not provide any law or accounting principles to establish its position that it is entitled to the deferral recovery treatment it seeks. Instead, DEC presented arguments, and the Commission, applying its policymaking expertise, concluded that ORS's recommended deferral treatment and the reasons provided were more persuasive. DEC also incorrectly compares the treatment of the Deferrals to the treatment of regulatory liabilities like accumulated deferred income tax ("ADIT") and the treatment of the effect of the Tax Cuts and Jobs Act ("TCJA"). As ORS witness Payne testified, these liabilities have prescribed accounting treatment methodologies that must be followed. (Tr. p. 1617-10, l. 12 – p. 1617-11, l. 6). The Deferrals do not have clearly defined procedures established to determine the regulatory accounting treatment for ratemaking purposes. *Id.* It is in the Commission's discretion as to what treatment to prescribe for ratemaking purposes.

There is substantial testimony in the record to support the Commission's decisions regarding the Deferrals, which result in just and reasonable rates that balance both the investor and consumer interests. ORS witness Payne testified to various standards utilized by other jurisdictions. (Tr. p. 1617-6, l. 8 – p. 1617-7, l. 2). ORS witness Payne also testified DEC is not guaranteed to earn a cost of capital return on deferred costs, and that determination is at the Commission's discretion. (Tr. p. 1610, ll. 18 – 23). Per ORS's recommendation, the Commission ordered each deferral balance be separated into two categories of costs, operating-related costs and capital-related costs, with recovery of both sets to be subject to the same regulatory accounting treatment required for each category absent an accounting deferral. (Tr. p. 1613-4, ll. 14 – 18). ORS witness Payne testified per the National Association of Regulatory Utility Commissioners ("NARUC") Rate Case and Audit Manual, regulatory assets and other deferrals should be examined to determine if the deferred costs are appropriate to be included in rate base, which is what this Commission did. (Tr. p. 1613-4, ll. 18 – 21). The Order allows DEC to a full "return of" its deferred expenses, aside from the deferred environmental costs. (Tr. p. 1613-5, ll. 3 – 5). The Order achieves an equitable sharing of deferred costs between the Company's customers and the Company's shareholders. (Tr. p. 1617-5, ll. 16 – 18). The testimony and evidence presented at the hearing supported the Commission's decisions on the Deferrals as follows:

1. With CWCC, based on the documentation DEC provided ORS, ORS recommended a deferral balance of $5,042,000, which allows DEC to recover the same deferred cost of capital and deferred depreciation expense as DEC proposed. (Tr. p. 1613-6, ll. 8 – 10). DEC offered no compelling testimony to support its requested deferral treatment. ORS's recommendation is consistent with regulatory accounting practices for capital-related and operating-related costs, and ORS's recommendation still allows DEC to recover its actual deferred costs. (Tr. p. 1613-6, ll. 13 – 18). ORS witness Morgan recommended an amortization period of 30 years for CWCC, which is the anticipated service life of the asset. (Tr. p. 2015-3, ll. 15 – 16). DEC offered no compelling testimony regarding the length of the amortization periods, however ORS witness Morgan testified the service life of an asset is the appropriate time period for amortization as that is the amount of time the asset is anticipated to benefit the customers. (Tr. p. 2017-2, ll. 16 – 20).
2. For Lee CC, based on the documentation DEC provided to ORS, ORS recommended a deferral balance of $21,946,000, allowing DEC to recover the same deferred cost of capital, deferred depreciation, deferred operation and maintenance, and deferred property tax expenses that DEC proposed. (Tr. p. 1613-7, ll. 20 – 22). ORS witness Payne testified ORS's recommendation to include the deferred cost of capital portion of the deferral in rate base and exclude the deferred depreciation, Operations and Maintenance ("O&M") expenses, and property tax expenses from rate base is consistent with regulatory accounting practices for capital-related and operating-related costs. (Tr. p. 1613-8, ll. 3 – 6). DEC offered no supporting testimony to its request for an amortization period of three years, while ORS witness Morgan testified the remaining service life of the asset was 39 years. (Tr. p. 2015-4, ll. 3 – 5).
3. With the environmental costs, as discussed above, there was substantial testimony to justify the Commission's treatment of DEC's expenses related to coal ash disposal and remediation. Due to the exclusion of the expenses related directly to CAMA, ORS recommended a deferral balance of $96,131,000 with the deferred capital costs to be included in rate base, as is consistent with regulatory accounting practices. (Tr. p. 1613-9, ll. 11 – 21).

4. With AMI, based on the documentation DEC provided ORS, ORS recommended a deferral balance of $32,629,000. (Tr. p. 1613-11, ll. 2 – 7). This recommendation would allow DEC to recovery the same deferred cost of capital and deferred depreciation expense as DEC proposed, and ORS recommended the deferred cost of capital be included in rate base. (Tr. p. 1613-11, ll. 9 – 12). This treatment is consistent with regulatory accounting practices for capital-related and operating-related costs, and this treatment allows DEC to recover its actual deferred costs through amortization of the proposed deferral balance which is a sufficient level of cost recovery. (Tr. p. 1613-11, ll. 12 – 17). DEC offered no support for its request to amortize this deferral over a three year period, but ORS witness Morgan testified the service life of the AMI meters is 15 years. (Tr. p. 2015-8, ll. 19 – 20). DEC witness Schneider also testified that the expected life of an AMI meter is 15 years for depreciation purposes. (Tr. p. 1072, l. 22 – p. 1073, l. 3).
5. With Customer Connect, ORS proposed a deferral balance of $3,189,000, DEC's actual deferred O&M expenditures as of December 31, 2018. (Tr. p. 1607-8, ll. 16 – 20). ORS's recommended treatment is consistent with regulatory accounting practices for operating-related costs, and still allows DEC to recovery its actual deferred costs through amortization of the proposed deferral balance which is a sufficient level of cost recovery. (Tr. p. 1613-13, ll. 7 – 10). In filing its application, DEC sought recovery of $4,025,000 in estimated expenses, which were not included as they were not known and measurable. (Tr. p. 1613-13, ll. 13 – 15). In Rebuttal testimony, DEC witness Smith requested the Company be allowed to adjust O&M for their actual 2018 expense amount of $3,189,000. (Tr. p. 659-18, ll. 20 – 21). In response, ORS witness Smith filed Surrebuttal Testimony and Exhibits that adjusted the Company's O&M by $2,549,000 to increase the Company's test year O&M of $640,000 to the 2018 actual expense of $3,189,000. (Tr. p. 1607-8, ll. 16 – 20).
6. With GIC, based on the documentation provided by DEC, ORS recommended a deferral balance of $5,904,000 which will allow DEC to recover the same deferred cost of capital, deferred depreciation, deferred O&M, and deferred property tax expenses that DEC proposed. (Tr. 1613-14, ll. 15 – 17). ORS recommended the deferred cost of capital portion of the deferral balance be included in rate base, which is consistent with

regulatory accounting practices. (Tr. p. 1613-14, ll. 18 – 23). This treatment allows DEC to recover its actual deferred costs through amortization of the proposed deferral balance, which is a sufficient level of cost recovery. (Tr. p. 1613-15, ll. 1 -3).

"The Commission sits as the trier of facts, akin to a jury of experts," Hamm v. SC PSC, 309 S.C. 282, 287, 422 S.E.2d 110, 113 (1992) (citing SC Tel. & Tel. Co. v. SC PSC, 270 S.C. 590, at 597, 244 S.E.2d 278, at 282 (1978)). Basing a decision on one party's testimony instead of another's is not an arbitrary action. See Docket 2001-209-C, Order No. 2004-257. The Commission "undeniably ha[s] the ability to choose between two competing positions as expressed in the record testimony." *Id.* The Commission, based on the testimony, reasonably adopted ORS's recommendations for the Deferrals. "The Commission has wide latitude to determine its methodology in rate-setting and there is no abuse of discretion where substantial evidence supports the finding of a just and reasonable rate." *Porter v. South Carolina Public Service Comm'n*, 328 S.C. 222, 233, 493 S.E.2d 92, 98 (1997) citing *Heater of Seabrook, Inc. v. Pub. Serv. Comm'n*, 324 S.C. 56, 478 S.E.2d 826 (1996). The Commission relied on testimony supporting its decisions regarding the Deferrals, therefore the rulings are neither arbitrary nor capricious. The Commission's conclusion that DEC be entitled to recover a return of all deferred costs (with the exception of coal ash costs) and that DEC only be allowed a return on its capital-related deferred costs achieves an equitable sharing of deferred costs between customers and shareholders that binding case law requires and is supported by the substantial evidence on the whole record.

C. <u>Return on Equity</u>

The Commission approved a return on equity ("ROE") for DEC of 9.5 %, which is supported by substantial evidence in the record. ORS witness David Parcell recommended that the Commission approve a 9.3% ROE, which was the midpoint of his range of 9.1% to 9.5%. The Commission's decision to apply a ROE of 9.5% is neither arbitrary nor capricious and is supported by substantial evidence in the record as further detailed below. The Commission Order is further supported by the rule in South Carolina that "[t]he Commission has wide latitude to determine its methodology in rate-setting and there is no abuse of discretion where substantial evidence supports the finding of a just and reasonable rate." *Porter v. Public Service Comm'n of S.C.*, 328 S.C. 222, 233, 493 S.E.2d 92, 98 (1997) citing *Heater of Seabrook, Inc. v. Public Service Comm'n of S.C.*, 324 S.C. 56, 478 S.E.2d 826 (1996).

DEC argues in its Petition for Rehearing or Reconsideration that the Commission should reconsider, and increase, the approved ROE because 9.5% is below the average awarded to DEC's peers in the Southeast. DEC provides no evidence or citation to support its claim that this position is proven by "undisputed evidence" in the record. In fact, 9.5% is much closer to the national average than DEC's requested 10.5% ROE. Wal-Mart Witness Tillman provided evidence to the Commission that the average ROE for the one hundred and eleven (111) reported electric utility rate case ROEs authorized by state regulatory commissions to investor-owned electric utilities from 2016 to date was 9.61%. (Tr. p. 1519-15 and See, Exhibit GWT-4.) Further, Tillman cited SNL Financial data showing the average ROE for vertically-integrated utilities from 2016 to the March 2019 was 9.76%, and that average authorized ROEs are trending downward over that period. (Tr. p. 1519-1, See, Hrg. Ex. 53 and 54.). This evidence of current ROE's, the downward trend in national averages, and testimony regarding DEC's relatively low risk, all evidence the mistakenness of DEC's claim that a 9.5% ROE is arbitrary and capricious. In its in-depth discussion of an appropriate ROE, the Commission thus properly discounted Mr. Hevert's recommended 10.75% as being far out of line with what is being awarded around the country.

DEC also argues that the Commission erred in awarding a higher ROE to South Carolina Electric & Gas ("SCE&G") in Docket 2017-370-E, in which Mr. Hevert also testified. This argument ignores that the other witnesses and evidence in this case were vastly different from those presented in the SCE&G case. In the present case, ORS presented a different witness, who used a different analysis to reach a different, though similar, recommendation. Mr. Parcell's position in the current case is also additionally supported by the testimony of Wal-Mart witness Tillman. A ruling as to the weight of evidence in the SCE&G case thus has no weight in the present case. The Commission's Orders must be "tailored to the factual circumstances of its case." *Heater of Seabrook v. Public Service Comm'n of S.C.*, 332 S.C. 20, 25, 503 S.E.2d 742 (1998). Further, "State law requires the PSC's 'determination of a fair rate of return' must be documented fully in its findings of fact and based exclusively on reliable, probative, and substantial evidence on the whole record." *Id.*, 332 S.C. at 28, 503 S.E.2d at 743. DEC's argument that an order issued by the Commission in a vastly different case based on different testimony and evidence is somehow precedent for the determination of an appropriate ROE in this case is ill-founded. The Commission's finding of an appropriate ROE in this case is based on the evidence in the record

and, despite the Company's protestations, it is not necessary that this ruling be reconciled with the Order in the SCE&G docket, or any other prior Order of this Commission.

DEC argues that the ORS and other parties abandoned any argument that DEC's ROE should be set at 9.5%. DEC argues that because the ORS proposed an alternative "Plan B" ROE of 9.76% without objection from the intervenors, the ORS abandoned its testimony and evidence submitted by ORS witness Parcell. (Petition p. 11). The issue has been resolved against DEC by Commission Orders No. 2002-761 and No. 2003-15 issued in Docket No. 2002-63-G. In Docket No. 2002-63-G, Piedmont Natural Gas ("PNG") requested an ROE of 12.6%. During the proceedings and its proposed order, PNG acknowledged that it would accept a lower ROE of 11.525%. The Commission granted PNG an ROE of 12.6%. Order No. 2002-761. The Consumer Advocate petitioned for reconsideration of Order No. 2002-761 arguing that by proposing an alternative acceptable ROE, PNG had waived any entitlement to an ROE of 12.6%. In Order No. 2003-15 denying the Consumer Advocate's petition for reconsideration, the Commission found and concluded that PNG presented expert testimony justifying an ROE of 12. 6%, that the Consumer Advocate failed to meet his burden that PNG voluntarily and intentionally abandoned its right to an ROE of 12.6%, and that the unsworn letter and proposed order did not rise to the same level of credibility as sworn testimony presented before the Commission. The Commission concluded that the record supported the award of 12.6%.

Order No. 2003-15 is controlling here. ORS witness Parcell testified that a reasonable ROE would fall in the range of 9.1% to 9.5%. (Tr. p. 1173, ll. 11 – 12). The ORS did not withdraw this testimony. DEC offered no evidence to prove that the ORS and other intervenors abandoned their right to argue in favor of an ROE in the range 9.1% to 9.5% ROE. Indeed, the law permits parties to take alternative positions. Last, the ORS letter proposing Plan B was not sworn and did not rise to the same level of credibility as ORS witness Parcell's sworn testimony. An ROE of 9.5% is fully supported by the record. *Heater of Seabrook, Inc. v. Pub. Ser'v Comm'n of S.C.*, 324 S.C. 56, 64, 478 S.E.2d 826, 830 (1996).

Three (3) parties' witnesses addressed the issue of ROE. Robert Hevert testified on behalf of DEC, David Parcell for ORS, and Gregory Tillman on behalf of Wal-Mart. Mr. Hevert recommended a ROE for DEC of 10.75% within a range of 10.25% to 11.25%. In the Company's Application, DEC requested that the Commission approve a ROE of 10.5%. See, Application of Duke Energy Carolinas, Para. 24 (Nov. 8, 2018). This recommended range is clearly

extraordinarily high and exceeds the afore-cited averages by approximately 100 basis points. The differential between the averages and Mr. Hevert's recommended ROE clearly supports the Commission giving greater weight to the testimonies of witnesses Parcell and Tillman.

DEC's witness Hevert acknowledged in testimony that DEC is no riskier an investment today than it was in 2014 when the Commission granted DEC a 10.2% ROE (Tr. p. 1843, ll. 17 - 22). DEC's argument that the difference between "less risky" and "not riskier" is a reversable error is misplaced and irrelevant. The Commission finding of a 9.5% ROE is well supported by other evidence in the record. The point regarding this testimony made in the Commission Order is that Mr. Hevert recommended a 10.75% ROE in the present case that is fifty-five basis points higher than the 10.2% ROE the Commission awarded DEC in 2014, yet there is no corresponding increase in risk to support such a large increase. Whether the Company is "less risky" or "not riskier" is a hair's breadth of difference – the point being that the Company is no riskier an investment now than it was in 2014.

In the Order, the Commission relied on and referred to the testimony of both Mr. Parcell and Mr. Tillman to establish that DEC is a financially sound, very large electric utility that should not be viewed as a risky investment and thus should not be entitled to a higher than average ROE, much less an ROE that is approximately 100 basis points higher than the national average, as Mr. Hevert recommended. There is no testimony or evidence in the record to support a finding that DEC has any particular or unique risk not typically encountered by other electric utilities.

Walmart witness Tillman testified that the average ROE for the one hundred and eleven (111) reported electric utility rate case ROEs authorized by state regulatory commissions to investor-owned electric utilities from 2016 to date is 9.61%. (Tr. p. 1519-15 and See, Exhibit GWT-4.) Further, Mr. Tillman cited SNL Financial data that shows the average ROE for vertically-integrated utilities authorized from 2016 to present is 9.76%, and that annual average authorized ROEs are trending downward (Tr. p. 1519-15, See, Hrg. Ex. 53 and 54).

In support of its reliance on his recommendation, the Commission provided in its Order that ORS witness Parcell has provided testimony as a ROE and Cost of Capital expert witness on several occasions before this Commission since the early 1980s (Tr. p.1178-2) and has testified in over 570 utility proceedings in approximately 50 regulatory agencies across the United States and Canada (Tr. p. 1178-1 - p. 1178-2). The record thus establishes that Mr. Parcell has extensive experience in calculating ROE and Cost of Capital recommendations and that the Commission was

justified in placing its reliance on his expert opinion in determining an appropriate ROE. The Commission additionally fully detailed in the Order the methodologies and procedures used by Mr. Parcell in reaching his recommendation.

The substantial evidence in the record supports the Commission's decision relying on Mr. Parcell. The Order recounts that the Direct and Surrebuttal Testimonies of Mr. Parcell employed three (3) recognized methodologies to estimate DEC's Cost of Equity: the DCF, CAPM, and Comparable Earnings (CE) models. He applied each of these methodologies to two (2) proxy groups – his own and the one developed by DEC witness Hevert – to establish a range of 9.1% to 9.5%, with a 9.3% mid-point. (Tr. p.1178-4, l.2). Mr. Parcell established this range based on the results of his DCF (range of 9.0% to 9.2% with a 9.1% midpoint) and CE (range of 9.0% to 10.0% with a 9.5% midpoint) models. As a result of these analyses, Mr. Parcell recommended a Cost of Capital in the range of 6.95 to 7.17 %, with a mid-point of 7.06 %. (Tr. p. 1178-3). In reaching his recommendation of a 9.3% ROE, Mr. Parcell in large part relied on the DCF model, which is an analysis of current market conditions. The DCF model relies on current stock prices in the marketplace and has traditionally been regarded by this Commission as the best indicator of the return investors require in the marketplace for investment-grade regulated utility companies. Mr. Parcell relied on the results of both his DCF and CE analyses to determine his ROE recommendation and did not include the results of his CAPM analysis, as he found that the resulting range (i.e., 6.3% to 6.6%) was too low to be practical (Tr. p. 1178-4). By excluding the results of his CAPM analysis from his final recommendation, Mr. Parcell further established the reasonableness of his recommended ROE.

The Commission also relied on Mr. Parcell's testimony, which demonstrated that Mr. Hevert's analyses showed a consistent pattern of choosing data and methodologies that result in the highest possible Cost of Equity conclusions. As the Commission correctly pointed out in questioning the testimony of the Company's Cost of Capital witness, the data used by Mr. Hevert was intentionally filtered to produce an inflated ROE recommendation to the benefit of the Company. The Commission additionally accepted Mr. Parcells assertion that Mr. Hevert's use of several "factors" to create more risk for DEC are already considered by the rating agencies and essentially resulted in Mr. Hevert "double-counting" risk in order to artificially inflate his ROE recommendation (Tr. p. 1178-57 – p.1178-58). The Commission thus provided significant justification for its refusal to accept Mr. Hevert's recommendation in this case.

Mr. Parcell's ROE recommendation was further supported by his testimony evidencing ROEs authorized by other regulatory bodies across the country. The Commission relied on evidence presented by Mr. Parcell that, from 2017 to 2018, ROEs allowed by regulatory jurisdictions across the United States for all electric utilities averaged 9.59% with a median ROE of 9.58% (See, Hrg. Ex. 26, DCP-2, Schedule 3). This national average is only 9 basis points higher than that awarded by the Commission in this proceeding and 29 basis points higher than Mr. Parcell's recommended 9.3% ROE. In contrast, this national average is 116 basis points lower than Mr. Hevert's recommended 10.75% ROE.

While Mr. Parcell was criticized by Mr. Hevert for his application of the CAPM, as noted above, Mr. Parcell did not use his CAPM analysis in formulating his recommended ROE in this case. (Tr. p. 1787-57 - p. 1787-60). By excluding his CAPM analysis, Mr. Parcell evidenced an effort to produce a fair and reasonable recommendation to the Commission. Conversely, DEC witness Hevert recommended that both of his DCF
analyses be given little weight by the Commission, apparently in large part due to these analyses yielding results he believed to be too low, and thus not advantageous to the Company (See, Tr. p.1787-32, Table 5 and P. 1787-32, Table 2).

Testimony and evidence submitted to the Commission in this proceeding, primarily through Mr. Tillman and Mr. Parcell, confirms a decline in ROEs across the country in recent years, supports the strength of market conditions, and indicates an anticipated upward trend in interest rates in the near term. These factors, along with the financial stability of DEC, strongly support the slight reduction in the national average ROE awarded by the Commission in this case. The Commission has substantial support in the record to support its discounting Mr. Hevert's ROE recommendation as biased in the Company's favor. Both Mr. Parcell's testimony regarding a 9.58% national average and the Commission's legitimate rejection of Mr. Hevert's recommendation establish that there was substantial evidence in the record to support the Commission's assignment of a 9.5% ROE.

The Company is, by law, entitled to a reasonable return on its allowable costs. See, *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.Ct. 281 (1944) and *Bluefield Water Works and Improvement Co. v. Public Service Comm'n of S.C.*, 262 U.S. 679, 43 S.Ct. 675 (1923). The South Carolina Supreme Court has held that "The PSC should establish rates that will produce revenues for the utility 'reasonably sufficient to assure the confidence in the financial soundness

of the utility...and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties'." *Kiawah Property Owners Group v. Public Service Comm'n of S.C.*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004) citing *Bluefield Waterworks*, 262 U.S. 679, 693. It is clearly counter to a fair balancing of these competing interests of the Company and its customers to approve a ROE that not only substantially exceeds what has been found to be reasonable by other Commissions across the country, but would in fact be the highest ROE awarded to any electric utility in the United States. (See, Hrg. Ex. 26, DCP-2, Schedule 3.)

While a public utility is entitled to earn a fair return, it has no entitlement or constitutional right to earn profits comparable with highly profitable enterprises or speculative ventures. *Bluefield v. Public. Service. Comm'n of S.C.*, 262 U.S. 679, 690.

The South Carolina Supreme Court has held that the Commission must determine a fair and reasonable rate of return and must document fully the evidence to justify the rate of return which they award. *Heater of Seabrook, Inc. v. Public. Service Comm'n of S.C.*, 324 S.C. 56, 64, 478 S.E.2d 826, 830 (1996) citing *Nucor Steel v. Public Service Comm'n of S.C.*, 312 S.C. 79, 439 S.E.2d 270 (1994). In fulfilling its obligation to balance the interests of the ratepayers with those of the utility, the Commission properly determined that the most appropriate ROE in this case is 9.5%, which is above the mid-point of the range recommended by witness Parcell and within nine basis points of the national average for all electric utilities.

The South Carolina Court has also held that the Commission's ratemaking decisions are entitled to deference and will be affirmed if supported by substantial evidence. *S.C. Energy Users Comm. v. Public Service Comm'n of S.C.*, 388 S.C. 486, 490, 697 S.E.2d 587, 589 (2010). "Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action." *Porter v. Public Service Comm'n of S.C.*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998). There can be no doubt that there was substantial evidence presented by both ORS and Walmart witnesses that support the Commission's finding of a 9.5% ROE.

D. <u>Coal Ash Litigation Expenses</u>

The Commission considered the substantial evidence on the whole record presented by the parties and determined that the Company failed to carry its burden of persuasion that its coal ash litigation expenses were reasonably recoverable.

The Company is correct when it asserted that it is "entitled to a presumption that its expenditures were reasonable and incurred in good faith[.] *Utilities Services. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 109-10, 708 S.E.2d 755, 762-63 (2011). (See Pet. p. 12.) However, "the presumption in a utility's favor clearly does not foreclose scrutiny and a challenge. In those circumstances, the burden remains on the utility to demonstrate the reasonableness of its costs." *Utilities Services*, 392 S.C. at 109-10, 708 S.E.2d at 762-63 (citing *Hamm v. S.C. Public Service Com'n*, 309 S.C. 282, 286-287, 422 S.E.2d 110, 112-113 (1992)). Moreover, the burden of proof in showing the reasonableness of a utility's costs ultimately rests with the utility. *Hamm*, 309 S.C. 282, 422 S.E.2d 110. In the presence of "evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures." *Utilities Services of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 110, 708 S.E.2d 755, 762–63 (2011). The Commission may rely on "any [] relevant evidence to determine that the presumption of reasonableness [has] been overcome as to a particular expense." *Utilities Services.*, 392 S.C. at 112, 708 S.E.2d at 764 (internal punctuation altered).

Ultimately, the Commission's conclusion that the burden has been overcome must rest upon "substantial evidence," which means "relevant evidence that, considering the record as a whole, a reasonable mind would accept to support [the Commission's] action." *Utilities Services*, 392 S.C. at 103, 708 S.E.2d at 759 (quoting *Porter*, 333 S.C. at 20, 507 S.E.2d at 332).

The presumption of reasonableness "does not shift the burden of persuasion but shifts the burden of production on to the . . . contesting party to demonstrate a tenable basis for raising the specter of imprudence." *Id.* "Burden of production refers to a party's responsibility to introduce sufficient evidence on a contested issue to have that issue decided by the fact-finder, rather than decided against the party in a preemptory decision. *Smith v. Barr*, 650 S.E.2d 486 (S.C. Ct. App. 2007).

"The Commission sits as the trier of facts, akin to a jury of experts," *Hamm v. S.C. Public Service Comm'n*, 309 S.C. 282, 287, 422 S.E.2d 110, 113 (1992) (citing *S.C. Tel. & Tel. Co. v. Public Service Comm'n of S.C.*, 270 S.C. 590, at 597, 244 S.E.2d 278, at 282 (1978), and is the ultimate fact-finder in a ratemaking application." *Utilities Servs.*, 392 S.C. 96, 106, 708 S.E.2d 755, 761. "It has the power to independently determine whether an applicant has met its burden of proof." *Utilities Servs.*, 392 S.C. at 106, 708 S.E.2d at 761.

The Commission properly determined that the Company failed to produce "specific information" that showed "the benefit to customers" of these expenses or that otherwise established the Company's entitlement to recovery. (Order at 63.) The Company failed to meet its burden of persuasion. (See *id.* at 63-64.) The Company's argument in its Petition is squarely premised on the assertion that "[t]he record in this docket does not provide a basis for overcoming the presumption that the Company's coal ash litigation expenses were reasonable and incurred in good faith." *See* Pet. p. 12. This assertion is incorrect.

Based on the substantial evidence on the whole record, the Commission properly excluded from recovery the litigation expenses detailed in Adjustment # 36. While the initial expenses for which the Company sought recovery—in essence naked numbers—may have been entitled to the presumption of reasonableness, once these expenditures were reasonably challenged—i.e. the testimony filed by ORS in which it recommended the Company not be entitled to recovery of coal ash litigation expenses[4]—the Company failed to provide meaningful justification for these expenses. ORS witness Hamm testified that the Company failed to provide the Commission with "specific and understandable information demonstrating that all expenses should be paid for by DEC customers in the first place." (Tr. p. 1309, ll. 3-6). This Commission has previously held, "[i]t is the responsibility of the regulated utility—not the Commission, ORS, or any other party—to support the operating expenses that contribute the utility's revenue requirement." (Commission Order No. 2018-68, p. 39 (under appeal)). This Commission cannot presume that the expenses a utility seeks to recover in its rates and charges are legitimate if they cannot be subjected to the scrutiny of an audit or examination. Every rate received by an electric utility must be just and reasonable. S.C. Code Ann. § 58-27-810. Absent additional information the Commission correctly concluded it would be unreasonable to pass these coal ash litigation expenses on to the Company's customers.

Furthermore, these expenses were incurred as a result of litigation that only came about due to the Company's handling of coal ash. The amount of the coal ash litigation expenditures is substantial. Based on the nature of these litigation expenses, the magnitude of these expenditures

[4] *See* Tr. p. 1630-7, ll. 11 - 19 in which ORS witness Hamm testified, in part, "DEC has not demonstrated that any of the coal ash litigation expenses merit inclusion in the rates that may be established by the Commission in this DEC proceeding."

raises additional concerns about whether the Company would have incurred these expenses in the absence of imprudence.

Sound regulatory policy further supports the view of the evidence that the Company's failure to provide the requested information to review the prudency of its coal ash litigation expenses rebuts the presumption of reasonableness. *See generally Patton v. SC PSC*, 280 S.C. 288, 291, 312 S.E.2d 257, 259 (1984) (citing *So. Bell Tel. and Tel. Co. v. SC PSC.*, 270 S.C. 590, 244 S.E.2d 278 (1978) (Commission is "the 'expert' designated by the legislature to make policy determinations regarding utility rates"). "[T]he PSC is entitled to create incentives for utilities to improve their business practices." *Utilities Servs.*, 392 S.C. at 105, 708 S.E.2d at 760 (2011) (citing *Patton*, 280 S.C. at 292, 312 S.E.2d at 259–60; *So. Bell Telephone*, 270 S.C. at 599, 244 S.E.2d at 283 (finding it was not improper for the PSC to consider whether a utility could undertake measures to cut costs and improve efficiency)). The Company's business practices include any and all actions and inactions that led it into its myriad coal ash-related legal battles. Making the Company bear these expenses incentivizes it to try to avoid a similar situation in the future. Disallowance encourages communication regarding the nature and origins of its legal expenses and promotes the resolution of clarity.

After the presumption of reasonableness was rebutted, the Commission correctly concluded that the Company failed to carry the burden of persuasion. The rules applicable to this issue are clear. The Commission, in properly considering all evidence on the whole record, determined that the presumption to which the Company was entitled had been rebutted and the Company failed to carry its burden of persuasion. As a result, the Commission properly denied recovery of the coal ash litigation costs.

Conclusion

ORS supports Commission Order 2019-323, excepting the issues raised by ORS in its petition for reconsideration and clarification, which is supported by substantial evidence contained in the record. As a result, ORS respectfully requests that DEC's Petition for Rehearing or Reconsideration be denied.

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